

**Editor's note: appeal filed Civ.No. A94-072 (D.Alaska Feb. 25, 1994), dismissed, (for lack of standing), (Feb. 15, 1995)**

VERN T. WEISS ET AL.

IBLA 91-224

Decided December 22, 1993

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting State mental health grant selection application A-052943 and approving Native village selection application AA-6707-D.

Affirmed.

1. Administrative Authority: Generally--Administrative Procedure: Judicial Review--Alaska: Alaska Native Claims Settlement Act--Alaska: Statehood Act--Alaska Native Claims Settlement Act: Native Land Selections: State-Selected Lands--Alaska Native Claims Settlement Act: Native Land Selections: Village Selections--Alaska Native Claims Settlement Act: Withdrawals and Reservations: Withdrawals for Native Selection: State-Selected Lands

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

APPEARANCES: James B. Gottstein, Esq., Anchorage, Alaska, for appellants; Roger L. Hudson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Russell L. Winner, Esq., Anchorage, Alaska, for Tyonek Native Corporation and Cook Inlet Region, Inc.

#### OPINION BY ADMINISTRATIVE JUDGE ARNESS

Vern T. Weiss, father and next friend of Carl Weiss, minor child, and Earl Hilliker, on behalf of themselves and all others similarly situated;

the Alaska Mental Health Association, Mary C. Nanuwak and John Martin, on behalf of themselves and all others similarly situated; Anita Bosel, Frances Doulin, Sharon Goodwin, and Gabriel Mayoc; and H. L., M. K., and Alaska Addiction Rehabilitation Services, have appealed from a February 22, 1991, decision of the Alaska State Office, Bureau of Land Management (BLM). The February 22 decision modified in part a February 1, 1991, decision entitled "Decision of August 4, 1976 Vacated[;] Mental Health Approval Rescinded[;] State Selection Application Rejected[;] Lands Proper for Village Selection Approved for Conveyance." The February 1 decision vacated the prior rejection of village selection application AA-6707-D filed by Tyonek Native Corporation (TNC), rescinded approval of Alaska's mental health grant selection application A-052943 as to approximately 8,708 acres, and approved conveyance of those 8,708 acres to TNC subject to various reservations, easements, and valid existing rights.

On August 29, 1960, the State of Alaska filed selection application A-052943 under section 202(a) of the Alaska Mental Health Enabling Act (AMHEA), P.L. 84-830, 70 Stat. 709, 711 (July 28, 1956), as supplemented by section 6(k) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339, 343 (July 7, 1958), seeking approximately 10,000 acres within protracted T. 12 N., R. 11 W., Seward Meridian, Alaska. Section 202 of AMHEA granted and entitled the Territory of Alaska to select up to 1 million acres of vacant, unappropriated, and unreserved public lands in Alaska, and provided that such lands, any income therefrom, and the proceeds from any disposition thereof were to be administered as a public trust with such proceeds and income first being applied to meet the necessary expenses of the mental health program of Alaska. 70 Stat. 711-12. This grant was confirmed and transferred to the State of Alaska by section 6(k) of the Alaska Statehood Act, 72 Stat. 343. On February 10, 1961, BLM tentatively approved the State selection, a decision that was modified on February 20, 1961, and February 5, 1962, to reflect amendments to the selection application. None of the selected land, designated after survey as Tract A, T. 12 N., R. 11 W., Seward Meridian, was patented to the State.

On December 17, 1974, TNC filed village selection application AA-6707-D pursuant to section 12 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1611 (1988), seeking conveyance of the surface estate of Tract A, T. 12 N., R. 11 W., Seward Meridian. Under 43 U.S.C. § 1611(a) (1988), Native village corporations were authorized to select certain lands from lands withdrawn by 43 U.S.C. § 1610(a) (1988), including lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act." 43 U.S.C. § 1610(a)(2) (1988). On August 4, 1976, BLM rejected TNC's application because the requested lands were unavailable for selection. In so doing, BLM found that lands selected by the State under AMHEA were not public lands as defined in section 3 of ANCSA, 43 U.S.C. § 1602 (1988), and were therefore not available for selection under sections 11(a)(1) and 12(a)(1) of ANCSA. Nor were such lands available under sections 11(a)(2) and 12(a)(2) of ANCSA, 43 U.S.C. §§ 1610(a)(2) and 1611(a)(2) (1988), BLM concluded, because a selection under AMHEA was not a selection under the Alaska Statehood Act.

TNC appealed and the Alaska Native Claims Appeal Board (ANCAB) affirmed rejection of TNC's selection application in a January 10, 1977, final order (ANCAB #VLS 76-12). TNC and Cook Inlet Region, Inc. (CIRI), sought review of ANCAB's final order in Federal district court, and the State of Alaska intervened as a defendant in the district court case. (Under 43 U.S.C. § 1613(f) (1988), CIRI, the regional corporation where the selected lands are located, would be entitled to a patent to the subsurface estate in lands patented to TNC.) On February 28, 1986, the district court affirmed the Department's decision in Tyonek Native Corp. v. Secretary of the Interior, 629 F. Supp. 554 (D. Alaska 1986).

On January 15, 1988, however, the U.S. Court of Appeals for the Ninth Circuit in Tyonek Native Corp. v. Secretary of the Interior, 836 F.2d 1237 (9th Cir. 1988), reversed the district court "[b]ecause the Secretary's decision was contrary to the clear language of the applicable statutes." 836 F.2d at 1241. The court of appeals decision considered whether ANCSA's withdrawal of "[a]ll lands \* \* \* selected by, or tentatively approved to, but not yet patented to the State under the Alaska Statehood Act" (43 U.S.C. § 1610(a)(2) (1988)), included lands selected by Alaska after statehood under AMHEA. The court held that Alaska's selection of lands under AMHEA was a selection under the Alaska Statehood Act and that such lands were therefore subject to selection by a Native village corporation under 43 U.S.C. § 1610(a)(2) (1988). 836 F.2d at 1241. The Alaska Mental Health Association, one of the appellants here, participated as amicus curiae before the court of appeals in support of the district court and Secretarial decisions. On July 29, 1988, the district court issued a final judgment reversing the ANCAB decision and remanding TNC's selection application to BLM for action in accordance with the decision of the court of appeals. Tyonek Native Corp. v. Secretary of the Interior, Case No. 86-3827, D.C. No. CV-A77-207-RMB (D. Alaska July 29, 1988).

On remand, BLM issued the February 1, 1991, decision vacating the August 4, 1976, decision. Citing the court of appeals opinion, BLM determined that the lands selected by the State and approved under AMHEA had been properly chosen by TNC under village selection application AA-6707-D. BLM then rescinded approval of the State's mental health grant selection, rejected State selection application A-052943 to the extent it conflicted with TNC's village selection application, and approved the conveyance of the surface estate of approximately 8,708 acres selected by TNC subject to various reservations. The February 22, 1991, decision corrected several minor errors in the allowable uses and easement language of the February 1 decision.

On appeal, appellants assert they have standing to appeal BLM's decision under 43 CFR 4.410(b) because they are beneficiaries of the trust created by section 202 of AMHEA. They state they have been certified as representative class action plaintiffs to assert their rights in the trust property against the State of Alaska in Weiss v. State of Alaska, Case

No. 4FA 82-2208 Civil (Superior Court, Fourth Judicial District, State of Alaska), and that the superior court's conclusion in a July 9, 1990, memorandum decision and order that appellants would be within their rights to litigate the issue of third party rights to the trust property affords them sufficient authority to pursue their claim to trust property in this forum. They maintain they have a property interest in the lands affected by the decision sufficient to support their standing to appeal BLM's decision.

Appellants argue that the decision of the court of appeals in Tyonek Native Corp. v. Secretary of the Interior, *supra*, does not preclude this appeal. Although they filed an amicus curiae brief before the court of appeals, they contend they were neither parties to the litigation that led to that decision, nor were they in privity with the State for purposes of applying the doctrine of res judicata. Appellants acknowledge that a beneficiary is generally bound by a trustee's representation of the beneficiary in prior litigation. They claim, however, that the State's breach of its duties as trustee in administering the trust, as found by the Alaska Supreme Court in State of Alaska v. Weiss, 706 P.2d 681 (Alaska 1985), establishes that a substantial divergence of interest between the State and the beneficiaries existed that prevented the State from adequately and fairly representing the beneficiaries in the Federal court proceedings. Appellants further assert the court of appeals decision does not bar this Board from considering their appeal. The law of the case doctrine does not apply, they insist, because that they are not asking the Board to defy the court of appeals, but rather want the Board to reach the same result reached by ANCAB by relying on different grounds.

Although appellants attempt to incorporate by reference all arguments previously made by the United States and the State of Alaska before BLM, ANCAB, the district court, and the court of appeals, these pleadings are not part of the record in this proceeding nor have appellants submitted copies of these pleadings to the Board. A party incorporating arguments made in another document must ensure that the incorporated document has been submitted to the Board. Absent copies of such documents, the Board is unable to consider the arguments raised in them. Nonetheless, appellants raise two issues challenging BLM's decision that they claim were not presented to the court of appeals. First, appellants argue that land selected and tentatively approved for conveyance to the State under AMHEA was not "to the State" within the meaning of section 11(a)(2) of ANCSA, 43 U.S.C. § 1610(a)(2) (1988). They assert that the court of appeals decision and all previous consideration of the issue focused on whether the term "under the Alaska Statehood Act" in 43 U.S.C. § 1610(a)(2) (1988) included lands selected under AMHEA and did not analyze whether the phrase "to the State" referred to land granted to the State of Alaska as trustee for the beneficiaries of the mental health trust created by AMHEA. Appellants claim that, under trust law principles, the true or beneficial ownership of trust property is held by the trust beneficiaries, represented by appellants, while the State, as trustee, holds bare legal or naked title to the trust corpus. While recognizing that the State may also be

a secondary beneficiary under the terms of section 202(e) of the AMHEA, appellants nevertheless argue that land grants under AMHEA were to the State solely as trustee and were not "to the State" within the meaning of 43 U.S.C. § 1610(a)(2) (1988). This argument was not raised by the State in the Federal court proceedings, appellants suggest, because such an argument would have conflicted with the position taken there that the State was not required to administer lands patented to the State under the AMHEA separately as a trust but could treat those lands as general grant lands.

Finally, appellants contend that conveyance of the land selected by the State under the AMHEA to parties other than beneficiaries of the mental health trust would be an unconstitutional taking without just compensation. They assert that the State of Alaska had performed all the prerequisites necessary to perfect its claim to the selected land and was unable to relinquish the trust's rights in the selected lands without breaching the trust. Appellants insist that Congress was without authority to cancel the trust's property rights in the selected lands and transfer them to TNC via the enactment of ANCSA. They maintain that interpreting section 11(a)(2) of ANCSA, 43 U.S.C. § 1610(a)(2) (1988), so as to empower TNC to select lands previously chosen by the State under the AMHEA violates the Fifth Amendment's prohibition against taking private property without just compensation.

[1] Assuming without deciding that appellants have standing under 43 CFR 4.410(b) to bring this appeal, we nevertheless conclude that the doctrine of the law of the case requires rejection of their challenge of the BLM decision. Under the principle of the law of the case, the decision of a Federal appellate court establishes the law binding further action in the same litigation by another body subject to its authority, including administrative agencies. City of Cleveland, Ohio v. Federal Power Commission, 561 F.2d 344, 346 (D.C. Cir. 1977). An inferior court has no power to deviate from the mandate issued by an appellate court and this rule is equally applicable to the duty of an administrative agency to comply with the mandate of the reviewing court. In re Wella A.G., 858 F.2d 725, 728 (Fed. Cir. 1988). On remand, an administrative agency is bound to apply the legal principles laid down by the court. Chicago & North Western Transportation Co. v. United States, 574 F.2d 926, 930 (7th Cir. 1978) (citing FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 145 (1940)). The doctrine, however, does not extend to every issue that could have been raised in the litigation but is limited to those issues actually decided either expressly or by necessary implication. Hester v. International Union of Operating Engineers, 941 F.2d 1574, 1581 n.9 (11th Cir. 1991), and cases cited. An agency on remand may reach the same result as it did formerly, so long as the basis for its determination differs from the one reversed by the reviewing court. See id.

The legal issue decided by the Ninth Circuit Court of Appeals in Tyonek Native Corp. v. Secretary of the Interior, supra, was whether lands selected by and tentatively approved to the State pursuant to AMHEA were

"selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act," and were therefore withdrawn under section 11(a)(2) of ANCSA, and available for village selection by TNC in accordance with section 12(a) of ANCSA. The court's ruling on this issue rejected the Secretary's interpretation, espoused here by appellants, as contrary to the clear language of the relevant statutes, and held that "the state selected the Mental Health Act lands at issue here under the Statehood Act and that such lands are therefore subject to section 1610(a)(2) of the Settlement Act." 836 F.2d at 1241. On judicial remand, BLM implemented the court's legal holding by issuing the appealed decision rejecting the State's AMHEA selection application and approving TNC's village selection for those lands. The court's legal determination also requires this Board to affirm the BLM decision implementing the court's order.

In an attempt to avoid the preclusive effect of the court's decision, appellants urge that it should be narrowly construed since it focused on the meaning of the phrase "under the Statehood Act" and did not expressly address the status of AMHEA lands as trust lands or the constitutionality of allowing trust lands to be selected by Native village corporations. These issues were not raised by the State and were not discussed by the court, appellants aver, because to do so would have raised conflicts with the State's position in the state court proceeding. Appellants reason, therefore, that the State's breach of its duties as trustee in administering trust property created a conflict of interest that prevented the State from adequately representing the interests of the trust beneficiaries in the Federal court proceeding.

The record before us, however, contains excerpts of the pleadings filed in the Federal court proceeding that show the State identified and relied on the status of AMHEA lands as public trust lands in its appellate brief (see appellate brief of State of Alaska, attached as Exh. A to TNC's and CIRI's Response to Appellants' Status Report and Reply to Answers), and also that one of the appellants here raised the allegedly new issues of the interpretation of the phrase "to the State" and the constitutionality of including AMHEA lands as lands subject to village selection in its amicus brief to the court of appeals. See Exh. C to TNC's and CIRI's Response to Appellants' Status Report and Reply to Answers. We conclude, therefore, that these issues were presented to the court of appeals and that the court's holding rejected these arguments by necessary implication. We also find that appellants have failed to show that the State inadequately represented the trust beneficiaries' interests in the Federal court litigation due to a significant divergence of interest or that appellants are not also bound by the court's judgment. See Restatement (Second) of Judgments §§ 41, 42 (1982).

We must therefore decline the invitation to express our opinion on the merits of other arguments raised by appellants. The Board does not provide advisory opinions on moot questions or abstract propositions. See, e.g., State of Alaska, 85 IBLA 170, 172-73 (1985). Resolution of this appeal by

application of the doctrine of the law of the case renders unnecessary any discussion of additional issues sought to be raised by the parties to this appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Franklin D. Arness  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge